

## 7A Am. Jur. 2d Automobiles § 135

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### Automobiles and Highway Traffic

Barbara J. Van Arsdale, J.D.; Keith A. Braswell, J.D., of the staff of the National Legal Research Group, Inc.; George Blum, J.D.; John Bourdeau, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Noah J. Gordon, J.D.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; and Eric C. Surette, J.D.

### III. Licensing, Taxation, and Registration

#### B. Drivers or Operators

#### 4. Suspension, Revocation, and Reinstatement of Licenses

##### b. Grounds for Suspension or Revocation

##### (3) Refusal to Submit to Intoxication Test

##### (c) Notification of Right to Refuse Test; Right to Counsel

## § 135. Right to counsel

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Automobiles](#)  144.1(1.20)

### A.L.R. Library

[Denial of Accused's Request for Initial Contact with Attorney—Drunk Driving Cases](#), 109 A.L.R.5th 611

[Driving while intoxicated: subsequent consent to sobriety test as affecting initial refusal](#), 28 A.L.R.5th 459

While some courts have found that the refusal to take a sobriety test until after consultation with an attorney does not constitute a justifiable or reasonable refusal to take such test,<sup>1</sup> other courts have found that a motorist has a right to consult with counsel before deciding whether to submit to testing; and refusal to take such a test until after consultation with an attorney is a justifiable and reasonable refusal, and may not result in the suspension or revocation of a license.<sup>2</sup> In some jurisdictions in which the implied consent law mandates that a driver arrested for driving while intoxicated (DWI) be advised of certain information upon being requested to submit to a chemical test, it does not require the arresting officer to inform the motorist that he or she has the right to consult an attorney before submitting to the test.<sup>3</sup> However, a driver arrested for DWI may request to speak to an

attorney and must be given a certain amount of time in which to attempt to contact an attorney; after that time has elapsed, if the driver still refuses to take the alcohol breath test, the refusal is final.<sup>4</sup> If the driver is not given the mandated time period in which to contact his or her attorney, the refusal of an alcohol breath test is invalid.<sup>5</sup>

A motorist's mistaken belief that he or she has a right to see an attorney prior to deciding whether to submit to testing does not excuse a refusal to take the test, where the police have adequately explained that there is no such right.<sup>6</sup> However, where the police fail to make it clear that there is no right to counsel, a motorist's refusal to be tested before conferring with counsel may not be the basis for a suspension.<sup>7</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Jail officers violated procedural due process by not allowing defendant access to phone to call attorney until morning after arrest for driving under the influence (DUI) despite his requests to call attorney at time of administration of State's test for blood alcohol concentration (BAC); allowing a phone call would have assured that defendant was given an opportunity to gather evidence to refute the charge against him, and additional fiscal or administrative burden of allowing DUI arrestees like defendant to make a phone call to an attorney after administration of a BAC test was minimal. *U.S. Const. Amend. 14. State v. Stegall*, 477 P.3d 972 (Idaho 2020).

A driver's right, under implied consent statute, to a 20-minute period in which to attempt to contact an attorney includes the right to speak privately with the attorney. *V.A.M.S. § 577.041.1. Roesing v. Director of Revenue*, 573 S.W.3d 634 (Mo. 2019).

Driver's limited right to speak to attorney before deciding whether to take field sobriety test was violated when officer responding to accident scene took her cellular phone away and did not allow her to finish her phone call with her attorney, and, thus, suppression of all evidence obtained by police subsequent to the taking of driver's cellular phone was warranted, including driver's incriminating statements and her performance of any field sobriety tests. *People v. Rossi*, 63 N.Y.S.3d 828 (J. Ct. 2017).

Results of chemical test, which yielded a blood alcohol content of .09%, were admissible in trial for driving while intoxicated, despite defendant's noncustodial request for counsel prior to test, where defendant unequivocally agreed to submit to breath test, and never invoked his qualified right to consult with counsel regarding his decision to take test. *People v. Benoit*, 66 Misc. 3d 218, 113 N.Y.S.3d 852 (N.Y. City Crim. Ct. 2019).

The limited statutory right of consultation with an attorney prior to taking a chemical test must be balanced against the need for an accurate and timely chemical test. *NDCC § 29-05-20. City of Jamestown v. Schultz*, 2020 ND 154, 946 N.W.2d 740 (N.D. 2020).

Police officer, who performed alcohol concentration breath test sequence on motorist after arresting motorist for driving a motor vehicle while under the influence of intoxicating liquor, did not violate motorist's limited statutory right to consult with counsel prior to submitting to a chemical test, although motorist requested the opportunity to speak with counsel between taking the first and second samples of breath during the test sequence, and although officer was required to provide motorist with a reasonable opportunity to speak with counsel; motorist's right to consult was not an unlimited right, and allowing motorist to stop the test prior to submitting the second sample would have invalidated the entire test sequence and materially interfered with the test administration. *NDCC §§ 29-05-20, 39-08-01, 39-20-07(5). State v. Von Ruden*, 2017 ND 185, 900 N.W.2d 58 (N.D. 2017).

[END OF SUPPLEMENT]

Footnotes

- 1 Kurecka v. State, 67 So. 3d 1052 (Fla. 4th DCA 2010); State v. Severino, 56 Haw. 378, 537 P.2d 1187 (1975); Mills v. Bridges, 93 Idaho 679, 471 P.2d 66 (1970); Com. v. Neary-French, 475 Mass. 167, 56 N.E.3d 159 (2016) (under the Sixth Amendment, there is no right to counsel at the time a defendant is deciding whether to submit to a breath alcohol test); Winter v. Peterson, 208 Neb. 785, 305 N.W.2d 803 (1981); People v. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670, 12 N.E.3d 1099 (2014); Cavaness v. Cox, 598 P.2d 349 (Utah 1979); Haas v. State, Dept. of Licensing, 31 Wash. App. 334, 641 P.2d 717 (Div. 1 1982).
- 2 Roberts v. State of Me., 48 F.3d 1287 (1st Cir. 1995); Whisenhunt v. State, Dept. of Public Safety, Div. of Motor Vehicles, 746 P.2d 1298 (Alaska 1987); Dain v. Spradling, 534 S.W.2d 813 (Mo. Ct. App. 1976); Kuntz v. State Highway Com'r, 405 N.W.2d 285 (N.D. 1987).
- 3 Staggs v. Director of Revenue, 223 S.W.3d 866 (Mo. Ct. App. W.D. 2007).
- 4 Commonwealth v. Bedway, 466 S.W.3d 468 (Ky. 2015) (arresting officers must make reasonable accommodations in allowing an accused his or her right to attempt to contact an attorney); Staggs v. Director of Revenue, 223 S.W.3d 866 (Mo. Ct. App. W.D. 2007) (20 minutes); People v. Borst, 49 Misc. 3d 63, 20 N.Y.S.3d 838 (App. Term 2015); Herrman v. Director, North Dakota Dept. of Transp., 2014 ND 129, 847 N.W.2d 768 (N.D. 2014) (if a person arrested for driving under influence (DUI) asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test); Texas Dept. of Public Safety v. Schleisner, 343 S.W.3d 292 (Tex. App. Houston 14th Dist. 2011).
- 5 Staggs v. Director of Revenue, 223 S.W.3d 866 (Mo. Ct. App. W.D. 2007).
- 6 Gaunt v. Motor Vehicle Div., Dept. of Transp., State of Ariz., 136 Ariz. 424, 666 P.2d 524 (Ct. App. Div. 1 1983).
- 7 State v. Taniguchi, 72 Haw. 235, 815 P.2d 24 (1991).

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